# Tan Sri Dato' Tajudin bin Ramli & Anor v Celcom (Malaysia) Bhd & Anor and another appeal (No 2)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)-1666 OF 2009 AND W-02(IM)-339 OF 2009
ABU SAMAH, AZAHAR MOHAMED AND AZIAH ALI JJCA
11 MARCH 2014

*Civil Procedure — Striking out — Application for — Whether claimed barred by res judicata/issue estoppel — Whether plaintiffs estopped from making claim — Whether claim made in bad faith — Whether claim time barred — Whether claim on its face obviously unsustainable — Rules of the High Court 1980 O 18 r 19(1)(a), (b), (c) &(d)*

*Civil Procedure — Striking out — Principles governing — Summary power to be sparingly exercised — Whether claim on its face obviously unsustainable*

There were two appeals, one arising from High Court Civil Suit No D1–22–1960 of 2006 ('the 1960 suit') and the other from High Court Civil Suit No D5–22–610 of 2006 ('the 610 suit'). In the 1960 suit, the relief claimed was for conspiracy by the defendants against the plaintiffs. The relief claimed in the 610 suit was for breach of fiduciary duties. In both suits, the defendants had applied to strike out the suits under O 18 r 19(1)(a) and/or (b) and/or (c) and/or (d) Rules of the High Court 1980. The applications were dismissed by the High Court. The defendants appealed against the dismissal on the following grounds: (a) that the plaintiffs' claims were barred and estopped by reason of issue estoppel and/or res judicata because the present claims were based on substantially the same facts and issues which had been raised and decided in an earlier arbitration; (b) that the plaintiffs were estopped from claiming for an indemnity for sums stipulated in the arbitration award when they had on their own volition paid under the proceedings commenced in England; (c) that the plaintiffs' claims were made in bad faith pursuant to a conspiracy to damage the defendants; and (d) that the plaintiffs' claim was time barred.

**Held**, dismissing both appeals with costs of RM20,000:

(1) Striking out is a summary power to be sparingly exercised and it should be exercised only in cases where it is conspicuously clear that the claim on its face is obviously unsustainable. If it can be shown that the pleadings disclose some cause of action or raised some question fit to be decided, however slight the chances of succeeding, the case should not be regarded as suitable for summary striking out (see para 12).

(2) The defendants were not parties to the arbitration. An arbitration only binds the parties to it and that an arbitration award has no effect on persons who were not parties to the same and cannot be relied on as evidence of the facts found for the purposes of subsequent proceedings (see para 14).

(3) Payment of the amounts due under the award was made by the first plaintiff under protest and without prejudice to the proceedings that it was bringing in Malaysia and that it may contemplate bringing in the future. The first plaintiff was obliged to make payment of the sums due under the award pursuant to legal proceedings instituted in England. Hence, it could not be said that the payment was made voluntarily. In fact it was made under legal compulsion. Moreover, the fact that the first plaintiff paid the sums due under the award could not have any bearing on the defendants' liability to the plaintiffs for the various breaches of fiduciary duty (see para 15).

(4) There was no basis to strike out the proceedings based on unsubstantiated, unfounded allegations of bad faith and conspiracy. The relief claimed in the 1960 suit for conspiracy was a reasonable cause of action. Whereas in the 610 suit the relief claim for breach of fiduciary duties as directors of the plaintiffs could not be said as obviously unsustainable (see para 16).

(5) Pursuant to s 6(1)(a) of the Limitation Act 1953, the time bar in respect an action founded on tort is six years from the date the cause of action arose. The cause of action for conspiracy only accrues when damage is suffered. In this case, the cause of action arose when the first plaintiff was ordered to pay damages pursuant to the award on 30 August 2005. Thus the plaintiffs' claim was not time barred (see para 17).

**[Bahasa Malaysia summary**

Terdapat dua rayuan, satu berbangkit dari Mahkamah Tinggi Guaman Sivil No D1–22–1960 Tahun 2006 ('guaman 1960') dan satu lagi dari Mahkamah Sivil Guaman No D5–22–610 Tahun 2006 ('guaman 1960'). Dalam guaman 1960, yang dituntut adalah terhadap konspirasi oleh defendan terhadap plaintif-plaintif. Relief yang dituntut dalam guaman 610 adalah untuk kemungkiran tanggungjawab fidusiari. Dalam kedua-dua guaman, defendan memohon untuk membatalkan guaman-guaman di bawah A 18 k 19(1)(a) dan/atau (b) dan/atau (c) dan/atau (d) Kaedah-Kaedah Mahkamah Tinggi 1980. Permohonan-permohonan telah ditolak oleh Mahkamah Tinggi. Defendan dalam memohon terhadap penolakan itu atas alasan berikut: (a) bahawa tuntutan plaintif-plaintif terhalang dan diestop dengan sebab isu estoppel dan/atau res judicata kerana tuntutan tersebut adalah berdasarkan sebahagian besar fakta yang sama dan isu-isu yang telah dibangkitkan dan diputuskan dalam timbang tara terdahulu; (b) bahawa plaintif diestop

daripada menuntut ganti rugi untuk jumlah yang ditetapkan dalam award timbang tara apabila mereka telah atas kehendak mereka sendiri membayar di bawah prosiding yang dimulakan di England; (c) bahawa tuntutan plaintif dibuat dengan niat jahat menurut konspirasi untuk merosakkan defendan; dan (d) bahawa tuntutan plaintif terhalang oleh had masa.

**Diputuskan**, menolak kedua-dua rayuan dengan kos sebanyak RM20,000:

(1) Pembatalan adalah kuasa ringkasan untuk dilaksanakan dengan berhati-hati dan ia hanya patut dilaksanakan dalam kes-kes yang mana adalah nyata bahawa tuntutan tersebut pada dasarnya jelas tidak mapan. Jika dapat ditunjukkan bahawa pliding mendedahkan beberapa kausa tindakan atau membangkitkan beberapa persoalan yang patut untuk diputuskan, walau sedikit pun peluang untuk berjaya, kes itu tidak patut dianggap sebagai bersesuaian untuk pembatalan terus (lihat perenggan 12).

(2) Defendan bukan pihak kepada timbang tara itu. Suatu timbang tara hanya mengikat pihak-pihak yang berkaitan dan award timbang tara tidak mempunyai kesan atas orang-orang yang bukan merupakan pihak-pihak kepada yang sama dan tidak boleh diguna pakai menjadi keterangan melalui fakta yang didapati untuk tujuan prosiding seterusnya (lihat perenggan 14).

(3) Bayaran bagi jumlah tertunggak di bawah award dibuat oleh plaintif pertama di bawah bantahan dan tanpa prejudis terhadap prosiding bahawa ia membawa masuk ke Malaysia dan ia mungkin mempertimbangkan membawa masuk pada masa hadapan. Plaintif pertama di bawah kewajipan untuk membuat pembayaran jumlah tertunggak di bawah award menurut prosiding undang-undang ditetapkan di England. Maka, tidak boleh dikatakan bahawa bayaran telah dibuat secara sukarela. Malahan, telah dibuat di bawah paksaan undang-undang. Selain itu, fakta bahawa plaintif pertama membayar jumlah tertunggak di bawah award tidak boleh mempunyai apa-apa kesan terhadap liabiliti defendan kepada plaintif untuk pelbagai kemungkiran tanggungjawab fidusiari (lihat perenggan 15).

(4) Tiada sebab untuk membatalkan prosiding berdasarkan sebab yang tidak disahkan, dakwaan yang tidak berasas untuk niat jahat dan konspirasi. Relief yang dituntut dalam guaman 1960 untuk konspirasi adalah kausa tindakan yang tidak munasabah. Manakala dalam guaman 160 relief yang dituntut untuk kemungkiran tanggungjawab fidusiari sebagai pengarah kepada plaintif tidak boleh dikatakan sebagai jelas tidak mapan (lihat perenggan 16).

(5) Menurut s 6(1) Akta Had Masa 1953, tempoh had masa berkaitan dengan tindakan berasaskan tort adalah enam tahun daripada tarikh

kausa tindakan dibangkitkan. Kausa tindakan untuk konspirasi hanya terakru apabila kerosakan ditanggung. Dalam kes ini, kausa tindakan timbul apabila plaintif pertama diarahkan untuk membayar ganti rugi menurut award pada 30 Ogos 2005. Oleh itu tuntutan plaintif tidak terhalang oleh had masa (lihat perenggan 17).]

**Notes**

For a case on principles governing, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) para 8079.

For cases on application of, see 2(3) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 7984–7991.

**Cases referred to**

*Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7, SC (refd)

*Omega Holdings Bhd v Dato' Tiah Thee Kian & Ors* [2002] 6 MLJ 20, HC (refd)

**Legislation referred to**

Limitation Act 1953 s 6(1)(a)

Rules of the High Court 1980 O 18 r 19(1)(a), (b), (c), (d)

**Appeal from:** Suit No D1–22–1960 of 2008 (High Court, Kuala Lumpur)

*Lim Kian Leong (Low Chi Cheng, Veronica Ong and Sharifah Nadia Aljafri with him) (Lim Kian Leong & Co) for the appellants.*

*Rabindra S Nanthan (Nad Segaram and Tay Por Hai with him) (Shearn Delamore & Co) for the respondents.*

**Azahar Mohamed JCA (delivering judgment of the court):**

CELCOM JUDGMENT NO 2

**[1]** There are two appeals before us.

**[2]** The first is Civil Appeal No W-02(IM)-1666 of 2009. The appellants in this appeal are the following defendants in Kuala Lumpur High Court Civil Suit No D1–22–1960 of 2006 ('the 1960 Suit'):

(a) the first defendant — Tan Sri Dato' Tajudin bin Ramli;

(b) the second defendant — Dato' Bistaman bin Ramli.

**[3]** The plaintiffs in the 1960 suit are Celcom (Malaysia) Bhd ('the first plaintiff') and Technology Resources Industries Bhd ('the second plaintiff').

**[4]** The second appeal is Civil Appeal No W-02(IM)-339 of 2009. The

appellants in this appeal are the following defendants in Kuala Lumpur High Court Civil Suit No D5–22–610 of 2006 ('the 610 suit'):

(a) the first defendant — Tan Sri Dato' Tajudin bin Ramli;

(b) the second defendant — Dato' Bistaman bin Ramli.

**[5]** As in the 1960 suit, the plaintiffs in the 610 suit are also Celcom (Malaysia) Bhd ('the first plaintiff') and Technology Resources Industries Bhd ('the second plaintiff').

**[6]** For convenience and ease of reference, we will refer to all the parties in this judgment as in the manner they were referred to in the 1960 suit and 610 suit in the court below.

**[7]** Both these appeals arise from the respective decisions of the learned High Court judges dismissing the applications filed by the first and second defendants seeking to strike out the plaintiffs' 1960 suit and 610 suit under O 18 r 19(1)(a) and/or (b) and/or (c) and/or (d) Rules of the High Court 1980.

**[8]** The background facts of 1960 suit and 610 suit have been set out in Celcom judgment No 1.

**[9]** In the 1960 suit, the relief claimed is for conspiracy by the defendants against the plaintiffs. The plaintiffs' claim in this suit is that both the first and second defendants wrongfully and by unlawful means conspired with each other to injure the second plaintiff and the first plaintiff and/or cause loss to the second plaintiff and the first plaintiff by causing and/or committing the first plaintiff and the second plaintiff to enter the supplemental agreement and the ARSA and thereby conferring on DTAH the buy-out provision in consideration for the renunciation by DTAH of the rights shares in favour of the first defendant. In the 1960 suit the plaintiffs also claim that both the first and the second defendants unlawfully conspired with each other to injure and/or cause loss to the second plaintiff and the first plaintiff with the sole and/or predominant purpose of injuring the second plaintiff and the first plaintiff by subjecting it to the buy-out provision for which there was absolutely no commercial benefit or justification whatsoever.

**[10]** On the other hand, the relief claimed in the 610 suit is for breach of fiduciary duties as directors of the plaintiffs. In this suit the claim against the first and second defendants is predicated on the following causes of action. First, breach by the first and the second defendants of their fiduciary duties to the second plaintiff as a result of the entry into the subscription agreement and the conferral of the veto rights as set out therein. And secondly, breach by the first and the second defendants of their fiduciary duties to the first and the

second plaintiffs as a result of the entry into the ARSA and the conferral of the buy-out provision and the veto rights as set out therein.

**[11]** As we have indicated earlier, the applications filed by the first and the second defendants seeking to strike out the 1960 suit and 610 suit were dismissed by the High Court.

**[12]** The principles that govern striking out applications are well known. It is a summary power to be sparingly exercised and it should be exercised only in cases where it is conspicuously clear that the claim on its face is obviously unsustainable (see *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36; [1993] 4 CLJ 7). If it can be shown that the pleadings disclose some cause of action or raised some question fit to be decided, however slight the chances of succeeding, the case should not be regarded as suitable for summary striking out (see *Omega Holdings Bhd v Dato' Tiah Thee Kian & Ors* [2002] 6 MLJ 20).

**[13]** Before us, learned counsel for the first and the second defendants raised three principal common grounds in support of these two appeals.

**[14]** First it was argued that the plaintiffs' claim are barred and estopped by reason of issue estoppel and/or res judicata and/or multiplicity from proceeding with claims in the present suits which are based on substantially the same facts and issues which have been raised and/or decided upon in the ICC arbitration. We find no merit in this appeal. The first and the second defendants were not parties to the arbitration. As we have decided in Celcom judgment No 1, an arbitration only binds the parties to it and that an arbitration award has no effect on persons who were not parties to the same and cannot be relied on as evidence of the facts found for the purposes of subsequent proceedings.

**[15]** Next it was argued that the plaintiffs are estopped from claiming for an indemnity for sums stipulated in the arbitration award when they have consented and on their own volition paid under proceedings commenced in England. Learned counsel submitted that the first plaintiff entered into unconditional consent judgments with the claimant in the arbitration proceedings and effected the said payment unconditionally in the English suit and hence any alleged right to an indemnity if any which is denied is wholly lost and/or has been extinguished. We are unable to accept this submission. It cannot be disputed payment of the amounts due under the award was made by the first plaintiff under protest and without prejudice to the proceedings that it is bringing in Malaysia and that it may contemplate bringing in the future. It must be borne in mind that the first plaintiff was obliged to make payment of the sums due to DTAH under the award pursuant to legal proceedings

instituted by DTAH against the first plaintiff in England. Hence, it cannot be said that the payment was made voluntarily; in fact it was made under legal compulsion. Moreover, in our view, the fact that the first plaintiff paid to DTAH the sums due under the award to DTAH does not and cannot have any bearing on the first defendant and the second defendant's liability to the plaintiffs for the various breaches of fiduciary duty as particularised in the statement of claim.

**[16]** Turning now to the argument that the plaintiffs' claims are made in bad faith and with ulterior motive and the plaintiffs are acting mala fides in filing the claim pursuant to a conspiracy to damage the first and second defendants. We find this submission lacked merit. We agree with the submissions of learned counsel for the plaintiffs that there is absolutely no basis to strike out the present proceedings based on unsubstantiated, unfounded allegations of bad faith and conspiracy. In this regard, it is important to bear in mind, as we have mentioned earlier, that the relief claimed in the 1960 suit is for conspiracy by the various defendants against the plaintiffs. This is a reasonable cause of action. Whereas in the 610 suit the relief claim for breach of fiduciary duties as directors of the plaintiffs as pleaded in the statement of claim, which cannot be said as obviously unsustainable as claimed by the first and second defendants.

**[17]** It was also contended that in respect of Civil Appeal No W–02(IM)–1666 of 2009, the plaintiffs' claim against the first and second defendants is time barred. There is no merit in this contention. Pursuant to s 6(1)(a) of the Limitation Act 1953, the time bar in respect an action founded on tort is six years from the date the cause of action arose. In our view, as correctly held by the learned High Court judge, the cause of action for conspiracy only accrues when damage is suffered. In this case, the cause of action arose when the first plaintiff was ordered to pay damages pursuant to the award on 30 August 2005. Thus the plaintiffs' claim is not time barred.

**[18]** The upshot of all this is that, in our judgment, the learned High Court judges had correctly dismissed the first and second defendants' applications seeking to strike out both the 1960 suit and 610 suit.

**[19]** In the result, we find no merits in these two appeals. Accordingly we

hereby dismiss both the appeals with costs in the sum of RM20,000 in favour of the respondents. Further we order the deposits to be paid to the respondents to account of costs.

*Both appeals dismissed with costs of RM20,000.*

Reported by Kanesh Sundrum